> "Ms. – Ms. Hepper, you're shaking your head yes.
>
> "MS. HEPPER: I've had several friends that told me they have been raped and I believe them."

Tr. 92.

In spite of the obvious bias exhibited by this statement, counsel failed to challenge Ms. Hepper for cause, and also failed to use one of his peremptory challenges, even though he had three remaining at the conclusion of *voir dire*.

With regard to counsel's failure to excuse this juror, the trial judge testified: "I couldn't believe [why trial counsel] didn't take her off the jury. He didn't ask me for cause, [for] which I would have immediately kicked her off." (Ex. 5, p. 23).

Opening Statement: Counsel's opening statement was remarkable in two respects. First, he failed to present a clear statement of the evidence that he intended to present. In fact, he became so bogged down in irrelevant detail that the trial judge repeatedly admonished him to expedite the presentation. (Tr. 183, 186, 200). Second, counsel actually made reference to the fact that Ryan was in custody at the time of trial. (Tr. 189). The judge reprimanded counsel for alluding to this fact (Tr. 190). Counsel replied that his reference to Ryan's incarceration was intentional, and that Ryan *wanted* the jury to know he was in jail, because he was convinced that his incarceration was terribly unfair.[6]

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[6] Petitioner denies that he wanted the jury to be aware of his custody status (Ex. 7, p. 18).

In response to counsel's claim that he was merely carrying out his client's wish, the trial judge observed: "It doesn't make any difference. He's the lawyer. [He should] tell [his client not to raise the point.] That's a lawyer's responsibility." (Ex. 5, p. 37).

State's Case: The chief witness on behalf of the state was the complainant, **Helen Adams**. The prosecutor was able to sculpt Ms. Adams' testimony through the unchallenged use of leading questions. *See, e.g.*, Tr. 226-239. Trial counsel also failed to object to testimony about what Adams had told her boyfriend. (Tr. 258). This hearsay testimony was clearly inadmissible and was highly damaging in view of the general lack of corroboration of Adams' story. Trial counsel then exacerbated this error by returning to this point during his cross-examination of Adams.

Trial counsel's complete lack of rudimentary litigation skills was again evident in connection with the testimony of **Les Dobbins**, a friend and work associate of Ryan's. Dobbins testified that Ryan had "confessed" to him that Ryan had sexually assaulted Adams. This damaging evidence was highly suspect because Dobbins had said nothing about any "confession" in his first interview with police or in his interview by the defense investigator. However, trial counsel was unable to adduce this powerful impeaching evidence because he failed to lay the necessary foundation during the state's case-in-chief. (Tr. 311-316; 419).

The Defense Case: Trial counsel's performance arguably reached its nadir during the defense case-in-chief. The first defense witness was **Gary Berardinelli**.

Trial counsel called him to testify about an alleged altercation between Ryan and a former friend of his, Bob Klingforth. However, Berardinelli testified that he had not witnessed any altercation. (Tr. 397). It is, therefore, clear that trial counsel either did not know what his own witness was going to say, or that he was planning to introduce evidence of the altercation through obviously inadmissible hearsay. Trial counsel also sought Berardinelli's opinion concerning the propriety of the relationship between Adams and Bob Klingforth, a former friend of Ryan's, that Adams was dating after breaking up with Ryan. When the prosecutor objected, trial counsel was wholly unable to offer any argument on behalf of the proffered evidence. (Tr. 395). As a result, the first defense witness gave no helpful testimony at all.

The next significant defense witness was investigator **Stephen Taylor**. Trial counsel first unsuccessfully attempted to elicit testimony from Taylor concerning Dobbins' failure to report Ryan's "confession" (Tr. 407).

Trial counsel also unsuccessfully attempted to secure the admission of hearsay testimony from Taylor concerning the absence of guns in Ryan's home (Tr. 419). Finally, trial counsel sought to elicit opinion testimony from Taylor to the effect that Adams was "cold and calculating" and that she was like a character in a "Sharon Stone movie." (Tr. 421). Not surprisingly, the prosecutor's objection to this line of inquiry was sustained. As a result, not one scintilla of helpful evidence was received from the defense investigator.

Another significant feature of Taylor's testimony was that it conclusively demonstrated that trial counsel did not know how to make an offer of proof. When the jury was

sent out so that the court could hear argument, trial counsel continued to make representations to the court about what Taylor's testimony would be, rather than simply eliciting the disputed testimony from the witness. At one point the judge had to instruct trial counsel to "do it as if you were trying the case." (Tr. 413). Trial counsel remained hesitant about eliciting the testimony, and the trial judge had to again say "go right ahead, the jurors are not in here." (Tr. 414). The inescapable conclusion from a review of the transcript, and the conclusion drawn by both trial counsel's assistant (Ex. 4, pp. 4-5) and the trial judge, was that trial counsel did not know how to make an offer of proof. (Ex. 2, p. 3).

The next defense witness was Ryan's mother, **Virginia Paul**. Mrs. Paul testified that Ryan only possessed two guns in 1996, neither of which broke in half. (Tr. 450-451). This fact was important because it was credible testimony that squarely contradicted Adams' claim that Ryan had "broken open" the gun after the alleged assault in order to show Adams that the gun was not loaded. (Tr. 246). However, the impact of this testimony was lost in a swarm of defense questions relating to minutiae concerning guns. (Tr. 451-453). In fact, the trial judge opined that Mrs. Paul's testimony was actually harmful because it created an inflated impression of Ryan's use of guns, and because it opened the door to testimony about Mrs. Paul's efforts to get Adams to reduce the charge from attempted rape to mere domestic assault. (Ex. 5, pp. 44-46).

The final defense witness was petitioner, **Danny Ryan**. Of course, this was the chief opportunity for Ryan to present a clear and cogent account of what happened. However, trial counsel did not give Ryan the opportunity to give such an account. Instead, trial counsel focused

attention on Ryan's claim that he sold the gun in question *prior to* the assault. Unfortunately, Ryan's account of the sale was sketchy and internally inconsistent. He originally told police that he sold the gun to an unknown person. Later he said that he sold the gun to an acquaintance by the name of Bob Pederson. However, investigator Taylor was unable to find Pederson, or indeed any other evidence that corroborated Ryan's claim that he sold the gun. Given these circumstances, Ryan's testimony on the subject was simply not credible.

Although Ryan's testimony about the gun was not credible, it at least had the virtue of clarity. Unfortunately, after the account of the gun sale, Ryan's testimony lost all coherence. As questioning proceeded his answers became longer and more disjointed. Finally, in apparent exasperation, the trial judge said to trial counsel: "I wish you would control your client and get us some [clear] answers, otherwise [the prosecutor] will be objecting all day." (Tr. 492).

In sum, not one of the defense witnesses gave helpful testimony. In fact, the trial judge asserted that "much of the defense case was actually *harmful* to [Ryan]." (Ex. 2, p. 3; emphasis added).

Closing Argument: The vices of the defense closing argument mirrored those of the defense case as a whole. The primary focus was on the incredible story about Ryan's sale of the gun. At no point did trial counsel offer a clear, cogent statement of Ryan's version of the incident. In addition, trial counsel made no reference to either the presumption of innocence or the reasonable doubt standard. Trial counsel also failed to give any separate analysis of the seven separate charges that were submitted to the jury. The last point is of decisive significance because

the jury itself gave separate consideration to the separate charges, as evidenced by the different number of jurors who voted for a guilty finding on the different charges.[7]

Verdict and Post-Verdict Motions: The jury convicted Ryan on all seven charges that were submitted to it.[8] After the verdict was taken, counsel immediately moved for a new trial and also for judgment notwithstanding the verdict (Tr. 693). Neither motion was well taken. *See* Oregon Revised Statute 136.535 (motion for new trial must be in writing); *State v. Metcalfe*, 328 Or. 309, 315, 974 P.2d 1189 (1999) (judgment notwithstanding the verdict not available in criminal cases). Trial counsel next insisted that Ryan had a right to be sentenced within 48 hours, notwithstanding the express terms of Oregon Revised Statute 137.020(2)(b). Finally, when the state asked for a pre-sentence report, trial counsel objected on the ground that one had already been done (Tr. 698). However, as the trial judge explained, the only investigation that had been conducted was a pre-trial custody interview and not a pre-sentence investigation. *Id.* Trial counsel was apparently unaware of the difference between the two.

Following his conviction, Ryan filed a state court petition for post-conviction relief pursuant to Oregon Revised Statute 138.510, *et seq.* Ryan claimed, *inter alia*, that the deficient performance of trial counsel amounted to a constructive denial of the right to counsel under the

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[7] For example, the vote on the Sodomy charge was 11 to 1, while the vote on the Attempted Rape charge was 10 to 2 (Tr. 670-93).

[8] The Theft III charge was dismissed at the conclusion of the State's case-in-chief pursuant to a motion for judgment of acquittal.

Sixth and Fourteenth Amendments to the United States Constitution, as construed in *U.S. v. Cronic*, *supra*. The post-conviction court denied Ryan relief and the Oregon Court of Appeals affirmed that ruling without opinion. 190 Or. App. 398, 79 P.3d 917 (2003).

On discretionary review, the Oregon Supreme Court began its analysis by giving a detailed exposition of the performance of trial counsel in the underlying criminal case. It acknowledged that there were significant deficiencies in counsel's performance. However, with regard to the merits of Ryan's *Cronic* claim, the court stated that counsel had to some extent acted as the advocate of Mr. Ryan, *e.g.*, by cross-examining the state's witnesses. The court concluded that the errors of counsel had not deprived the trial of its adversarial character and that, accordingly, no constructive denial of counsel occurred. The court further rejected Ryan's claims that (1) structural error had occurred under *Arizona v. Fulminante*, 499 U.S. 279 (1991); and (2) counsel's performance was both deficient and prejudicial, thus requiring relief under *Strickland v. Washington*, 466 U.S. 668 (1984). In addition, the court rejected Ryan's cognate claims under Article I, section 11, of the Oregon Constitution.

II. Presentation of Federal Claim in State Court

In his petition for post-conviction relief, Ryan alleged, *inter alia*:

> "Petitioner claims that post-conviction relief should be granted on the ground that he was constructively denied his right to counsel [under]

> the United States Constitution, Amendments VI and XIV."

Petition for Post-Conviction Relief, 1-2.

In his accompanying memorandum of law, Ryan cited *U.S. v. Cronic*, *supra*, in support of his constructive denial of counsel claim. Memo at 42-43. The trial court reached the following conclusion of law:

> " * * * petitioner was not denied the right to assistance of counsel, as guaranteed by * * * the United States Constitution and as articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984)[.]"

App. 38.

Ryan appealed the post-conviction trial court ruling to the Oregon Court of Appeals. In his brief, Ryan made the following assignment of error:

> "The post-conviction court erred in concluding that the performance of trial counsel did not constitute structural error *or give rise to presumed prejudice*."

Appellant's Brief, p. 35 (emphasis added). In his supporting legal argument he again expressly relied on *U.S. v. Cronic*, *supra*, Appellant's Brief, p. 4. The Oregon Court of Appeals affirmed the decision of the trial court without opinion. App. 41.

Ryan then sought and obtained discretionary review by the Oregon Supreme Court. In his brief on the merits, the third question presented was as follows:

> "Does the representation of a criminal defendant by an attorney who lacks knowledge of criminal

> law and procedure, and who possesses no litigation skills, give rise to prejudice *per se* under [the Sixth and Fourteenth Amendments to the United States Constitution]?"

As noted above, the Oregon Supreme Court answered that question in the negative, holding that the petitioner had failed "to demonstrate [a constructive denial of counsel] as that concept has been articulated by the United States Supreme Court."[9] App. 28.

REASONS FOR GRANTING THE WRIT

This case involves the most fundamental of all the rights of the criminal accused, i.e., the right to be represented by counsel. This right is regarded as the most fundamental because legal representation is necessary to secure all the other rights possessed by the accused. *Cronic*, 466 U.S. at 653-54. For that reason, this Court has held that the Sixth Amendment right to counsel must be understood to embrace the right to the *effective* assistance of counsel. *Cronic*, 466 U.S. at 654. Where, as here, an attorney lacks even a minimal level of experience, skill, and knowledge, his or her representation must be deemed to be constitutionally ineffective.

The basic framework for evaluating the effectiveness of counsel in a criminal case was established by the companion cases of *Strickland v. Washington*, *supra*, and *U.S. v. Cronic*, *supra*. In *Strickland*, this Court held that in order to prevail on an ineffective assistance of counsel

[9] The Oregon Supreme Court treated Ryan's *Cronic* claim and his *Fulminante* claim as "identical." *Id.* at 297 n. 9.

claim, the defendant had to establish (1) that "counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688, and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors * * * the result of the proceedings would have been different." *Id.* at 694. In *Cronic*, this Court identified three categories of cases where the twin *Strickland* requirements of deficient performance and prejudice to the defendant did not apply: First, where there is a "complete denial of counsel." *Cronic*, 466 at 659. Second, where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* Third, where the circumstances of the trial prevent counsel from affording effective representation. *Id.* at 659-660.

With respect to *Cronic's* second category of cases, the Court cited *Davis v. Alaska*, 415 U.S. 308 (1974) in which counsel was denied the right to effective cross-examination. *Cronic*, 466 U.S. at 659. However, the Court offered no further guidance concerning *Cronic* category No. 2. With respect to the attorney performance at issue in *Cronic*, the Court concluded that counsel's inexperience and the complexity of the case did not create circumstances under which effective representation was impossible (*Cronic* category No. 3).

As discussed below, the instant case merits review by this Court for three reasons. First, the Court has yet to explicate fully the requirement that the defense lawyer must subject the prosecution's case to "meaningful adversarial testing." Second, the construction given this requirement by the Oregon Supreme Court conflicts with apposite state and federal decisional law. Finally, the issue presented in this case is of fundamental importance.

I. The Oregon Supreme Court's Decision Provides this Court with an Opportunity to Explicate the Proper Test for Determining Whether Defense Counsel in a Criminal Case has Failed to Subject the Prosecution's Case to Meaningful Adversarial Testing

The second *Cronic* exception to the *Strickland* prejudice analysis was first explicated by this Court in *Bell v. Cone*, 535 U.S. 685 (2002). In *Bell*, trial counsel failed to give a closing argument and to present mitigating evidence in the penalty phase of a capital case. On federal habeas review, the Sixth Circuit held that counsel had failed to subject the state's case to meaningful adversarial testing, and, thus, that prejudice would be presumed.

This court disagreed, stating:

> "Respondent argues that his claim fits within the second exception identified in *Cronic* because his counsel failed to 'mount some case for life' after the prosecution introduced evidence in the sentencing hearing and gave a closing statement. Brief for Respondent 26. We disagree. When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. * * * Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind."

Id. at 696-697.

The adversarial testing prong of *Cronic* was further explicated in *Florida v. Nixon*, 534 U.S. ___, 125 S.Ct. 551 (2004). *Nixon* involved a capital case in which defense counsel was faced with overwhelming evidence that the defendant had committed the charged offense. He adopted a strategy of conceding guilt and then focusing on the penalty phase of trial. The Florida Supreme Court reversed the defendant's conviction and death sentence on the ground that counsel had failed to subject the prosecutor's case to adversarial testing. On review, this Court concluded that, in light of the compelling evidence of the defendant's guilt, trial counsel's strategy was a reasonable one. It, therefore, rejected the claim that counsel had entirely failed to function as the client's advocate.

Petitioner respectfully acknowledges that these cases provide some guidance as to the contours of *Cronic* exception No. 2. More specifically, they establish that (1) a challenge to specific asserted errors calls for a *Strickland* and not a *Cronic* analysis; and (2) the *Cronic* analysis must take account of the trial as a whole. However, *Bell* and *Nixon* both involved high-risk strategies adopted in difficult capital cases. They provide little guidance as to how the second exception of *Cronic* is to be applied in a non-capital case involving pervasive incompetence of trial counsel. Petitioner respectfully suggests that the instant case provides the ideal vehicle for addressing that question.

The list of trial counsel's errors and deficiencies, and the evidence of his incompetence is so extensive that it

cannot be rehearsed adequately in the present context.[10] Suffice it here to make the following observations. First, he mishandled the pre-trial motions. Second, he alienated the jury during voir dire and failed to excuse an obviously biased juror. Third, his cross-examination of the state's witnesses actually elicited testimony that was helpful to the prosecution. Fourth, he failed to offer powerful impeachment evidence. Fifth, his presentation of defense witnesses was actually harmful to the defense. In addition, he lacked knowledge of such basic litigation skills as how to make an offer of proof. And he was ignorant of many key aspects of criminal procedure, *e.g.*, the procedure for moving for a new trial. The upshot was this: although trial counsel nominally deployed adversarial tools (*e.g.*, cross-examination), he did so in a way that did not, in fact, assist in Mr. Ryan's defense.

II. The Oregon Supreme Court's Decision Conflicts with Several Decisions by the United States Courts of Appeal and with Decisions of the Highest Courts of Other States

Ryan further notes that the Oregon Supreme Court's decision is inconsistent with other state and federal cases applying *Cronic* category No. 2. For example, in *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), the defendant was hired to kill a co-defendant's wife. The defendant's lawyer did not interview any witnesses, did not conduct any legal research, and did not obtain or review any records relating, *e.g.*, to defendant's employment or mental health. Counsel also failed completely to develop a rational

[10] For a full discussion of counsel's performance please see the Statement of Facts.

defense theory. In addition, he tried to establish that the defendant was abnormal by eliciting damaging testimony, and making personal attacks. The defendant was found guilty and sentenced to death. The Sixth Circuit affirmed the district court's grant of a writ of habeas corpus explaining:

> "The court's recognition that the right to counsel is the right to effective assistance of counsel would be devoid of meaning were counsel like [defense counsel herein] deemed effective."

Id. at 1160 (citations and quotations omitted).

And in *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988), the court found a *Cronic* violation in the sentencing phase of a capital case, although trial counsel called the defendant as a witness, cross-examined the state's witnesses, had a psychiatrist testify concerning the defendant's mental status, and made a closing argument. The court concluded that this effort had not created a true adversarial proceeding because counsel (1) had not prepared the psychiatrist to testify; (2) failed to call available mitigating witnesses; (3) failed to present mitigating medical evidence; (4) failed to challenge ex parte communications between the prosecution and the judge; and (5) failed to exploit the fact that the defendant had a lower degree of culpability than his co-defendants. The court also emphasized that the tenor of counsel's remarks during the sentencing, as well as his statements to the press, made clear that counsel was not truly acting as his client's advocate. Of particular importance in the instant context is that the Sixth Amendment violation was found, even though counsel performed some of his adversarial functions, *e.g.*, by cross-examining witnesses.

The concept of constructive denial of counsel has been given similar application in state courts. For example, in *Ross v. Kemp*, 260 Ga. 312, 393 S.E.2d 244 (1990), the defendant's family retained counsel, and the trial court appointed counsel because it believed retained counsel lacked the competence to try the case. The two attorneys did not coordinate their efforts, but rather pursued different strategies during the trial. In addition, the defendant was called as a witness without any discussion of the merits of that course of action, and without any preparation for either direct or cross-examination. The court held: "The presentation of a fractured defense, and the placement of petitioner on the stand with no preparation whatsoever in a trial in which his life hung on the balance is 'ineffectiveness so pervasive that a particularized inquiry into prejudice is unnecessary.'" *Id.* at 315.

And in *State v. Harvey*, 692 S.W.2d 290 (Mo. 1985), defendant's counsel refused to participate in the case following voir dire because he was unprepared and overly fatigued. As a result, there was no evidence presented for the defense and no cross-examination of the state's witnesses. The Missouri Supreme Court held that absence of adversarial testing gave rise to presumed prejudice under *Cronic*.

In each of the foregoing cases, the various state and federal appellate courts adopted an approach to *Cronic* category No. 2 that was more protective of the defendant's rights than the approach taken by the Oregon Supreme Court in the case at bar.

III. Explication of the Second Prong of *Cronic* is of Fundamental Importance to the Criminal Justice System

Finally, petitioner respectfully contends that the issue raised in this case is of fundamental importance to the criminal justice system. As this Court recognized in *Cronic*:

> "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail,' as this Court has recognized repeatedly. 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'"

Cronic, 46 U.S. at 653-54 (footnotes omitted).

Moreover, as the *Cronic* Court recognized, that right is imperiled not only by the commission of specific errors that prejudice the accused, but also by a failure to test rigorously the merits of the prosecution's case. That important teaching can only find adequate expression if this Court applies the second prong of *Cronic* in a case like the present one, in which counsel was pervasively incompetent.

Furthermore, it is clear that this issue arises with considerable frequency, as evidenced by the many state

and federal decisions applying *Cronic*.[11] It is, therefore, clear that the instant case has broad ramifications for the criminal justice system.

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

STEPHEN A. HOUZE
Attorney for Petitioner

July 2005

[11] Ryan's computer search disclosed over 2,500 citations to *Cronic*. Of course, this number only represents the cases that resulted in the issuance of an appellate opinion. The actual number of cases which have raised the issue of constructive denial of counsel is necessarily far greater.

FILED: March 10, 2005

IN THE SUPREME COURT
OF THE STATE OF OREGON

DANNY THOMAS RYAN,

Petitioner on Review,

v.

JOAN PALMATEER,
Superintendent,
Oregon State Penitentiary,

Respondent on Review.

(No. 99C-18624; CA A118415; SC S51169)

En Banc

On review from the Court of Appeals.*

Argued and submitted November 8, 2004.

Stephen A. Houze, Portland, argued the cause and filed the brief for petitioner on review.

Kathleen Cegla, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

BALMER, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

BALMER, J.

Petitioner in this post-conviction case alleges that he received inadequate assistance of counsel under Article I,

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* Appeal from Marion County Circuit Court, Joseph C. Guimond, Judge. 190 Or App 398, 79 P3d 917 (2003).

section 11, of the Oregon Constitution and ineffective assistance of counsel under the Sixth Amendment to the federal constitution. He argues that his trial counsel's errors prejudiced him and that, even if he cannot prove actual prejudice, this court should grant post-conviction relief because of "structural error" at his trial.[1] The post-conviction court held that petitioner's rights had not been violated. The Court of Appeals affirmed without opinion. *Ryan v. Palmateer*, 190 Or App 398, 79 P3d 917 (2003). We affirm for the reasons stated below.

I. FACTS AT TRIAL

We begin by describing the proceedings and evidence at petitioner's underlying trial. The state indicted petitioner for sodomy, attempted rape, third-degree theft, and three counts of menacing.[2] All the charges involved allegations by petitioner's former girlfriend that he had threatened her with a rifle and forced her to perform oral sex.

A. *Pretrial Motions*

Initially, petitioner was represented by appointed counsel who entered a not guilty plea and filed pretrial

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[1] In their briefs and pleadings, the parties in this case refer to claims of "structural error" and "*per se*" or "presumed" prejudice, and they often use the terms interchangeably. Although we acknowledge that those terms may have distinct meanings in other contexts, they do not appear to mean different things here. Therefore, we treat the parties' arguments and this opinion's analysis as applying equally to all those terms. For simplicity's sake, we refer to "structural error" only.

[2] After the initial indictment, petitioner was indicted separately for two counts of witness tampering because he allegedly asked a friend to write to the victim and ask her to refuse to testify or to change her testimony. All the charges were tried together. We do not discuss the witness tampering charges because none of petitioner's claims concern them.

motions challenging the application of Ballot Measure 40 (1996)[3] and Ballot Measure 11 (1994)[4] to petitioner's case. Petitioner dismissed his appointed counsel and retained trial counsel, who filed a motion *in limine* seeking, among other things, to suppress evidence of petitioner's previous convictions for DUII and solicitation, the victim's testimony that petitioner had told her that he had AIDS, the victim's testimony regarding telephone calls to her boyfriend and to her therapist, and the contents of a note that the victim discovered just before the crime.

The trial court addressed the pretrial motions immediately before the trial began. The prosecutor raised the matter of the motion *in limine* and informed the court that the state did not intend to introduce some of the evidence that the motion challenged, including petitioner's previous convictions for DUII and solicitation. Thereafter, the court rejected several of trial counsel's arguments in the motion *in limine* and ruled that the court would admit the victim's testimony that petitioner had told her that he had AIDS and her testimony regarding the contents of the note. (Trial counsel had challenged the latter testimony as not constituting the best evidence of the note.) However, pending offers of proof, the court withheld decisions

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[3] Ballot Measure 40 contained a number of provisions regarding criminal procedure and criminal trials. After the trial in this case, this court held Measure 40 unconstitutional. *Armatta v. Kitzhaber*, 327 Or 250, 285, 959 P2d 49 (1998). The legislature later enacted separately certain provisions of Measure 40. *State v. Fugate*, 332 Or 195, 199-201, 26 P3d 802 (2001) (describing provisions of Oregon Laws 1997, chapter 313, commonly known as Senate Bill 936). However, those changes do not apply to this case.

[4] Ballot Measure 11 set mandatory minimum sentences for certain felony offenses. It was codified as ORS 137.700.

regarding the admissibility of other evidence, such as the content of the victim's telephone calls to her boyfriend and to her therapist after the crime.

Trial counsel then directed the court's attention to the Measure 11 and Measure 40 motions that petitioner's previous counsel had filed, stating that he did not know whether the court had heard those motions. The trial court stated that it would adhere to the uniform rulings of the circuit court's motions panel concerning Measure 11 and advised trial counsel to reserve his rights on that issue. Trial counsel did so and also reserved his rights regarding Measure 40. The prosecutor then requested that the court not rely on any provisions of Measure 40 because petitioner's alleged crimes had occurred before the passage of Measure 40. The trial court agreed.

B. *Voir Dire*

Jury selection began later that day. After asking the potential jurors what person they respected most, what that person would say about them, and what they would like "to see come out of this case," trial counsel began to "share [his] fears" with the jury pool. When he described a North Carolina defendant who had been "locked up pending trial" for three and a half years, the court ordered trial counsel to stop that discussion.[5]

Trial counsel then asked more specific questions about cases involving rape and sodomy.

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[5] Presumably, trial counsel had intended to tell the prospective jurors that the North Carolina defendant had been innocent.

> "[Trial Counsel:] Okay. If somebody simply says – if somebody says – if somebody makes an accusation, 'I was raped or sodomized,' do we believe them automatically? We do? [Juror Ten], you're shaking your head yes.
>
> "[Juror Ten:] I've had several friends that told me they have been raped and I believe them.
>
> "[Trial Counsel:] And –
>
> "[Juror Ten:] But I don't know anything. It all happened before I ever knew them.
>
> "[Trial Counsel:] Why did you believe them?
>
> "[Juror Ten:] Because they were my friends, and I (unintelligible). Something like that.
>
> "[Trial Counsel:] Would anybody else in the room require something more than somebody just making an accusation? Do we need other evidence? For instance, in this case we're talking about Attempted Rape with a Weapon and Sodomy with a Weapon. Should we have a weapon? What if we didn't have a weapon?"

Trial counsel then talked with the jurors about the need for proof to support the charges. Trial counsel did not challenge the inclusion of Juror Ten on the jury.

After *voir dire,* the trial judge conferred with trial counsel, the prosecutor, and petitioner about trial counsel's implication that some defendants are incarcerated pending trial. The court informed petitioner of his right to keep the jury unaware of his incarceration and of the importance of that right. Petitioner personally responded that he wanted the jury to know that he was in custody, because he believed that he had been incarcerated unjustly. Trial counsel agreed, telling the court that he had disclosed that

fact purposely. The court ordered trial counsel not to allude to petitioner's incarceration again.

C. *The State's Case*

The state's case against petitioner consisted of the victim's testimony about the crime, the testimony of the victim's boyfriend and her therapist regarding telephone calls that the victim had made to them after the crime, and the testimony of petitioner's friends that petitioner had confessed to them that he had committed the crimes.

1. *The Victim's Testimony*

On direct examination, the victim testified that she ended her intimate live-in relationship with petitioner in June 1996 and started dating her current boyfriend, Klingforth, several months later. Klingforth was petitioner's best friend, and that fact made matters between petitioner and the victim increasingly acrimonious. At petitioner's invitation, the victim agreed to meet petitioner at his home on the evening of September 12, 1996, to finalize the breakup. Petitioner, a hairdresser, told the victim that he had an appointment with a client at his home at 8:00 p.m.

The victim testified that she arrived at 6:40 p.m. Soon after she arrived, petitioner asked her to have sex with him, but she refused. She testified that petitioner insisted that she go to his bedroom to get a gift that he had left there for her. On the bed, she found a "little ring-type box" containing a handwritten note reading, "Fuck you." The victim testified that petitioner then threatened her with a rifle, made her remove her clothing, and forced her to perform oral sex. He told her that he had AIDS and had

slept with prostitutes and said, "I think I'm going to just go ahead and fuck you." However, instead of further assaulting the victim, petitioner showed her that the rifle was not loaded by "breaking it in half, opening it up, and [sliding] the barrel * * * down." The victim described the weapon as an old rifle with a silver barrel. Petitioner said that he would call Klingforth to tell him that they had "made love for the last time and parted as friends." The victim left the house and went to her car, but petitioner followed her and took two letters from her car that she had written to him. Then petitioner's client arrived, and the victim drove away.

The victim then described a series of telephone calls that she had placed and received after leaving petitioner's home. From the car, she called Klingforth, telling him that petitioner would be calling but that she had not consented to anything that petitioner might describe. Klingforth asked the victim whether petitioner had raped her, and she said that he had not. Upon arriving home, she called Klingforth again to say that she would call again shortly, after her son-in-law, who lived with her, had left the house. Later, she called Klingforth a third time and told him that petitioner had used a gun and had forced her to have oral sex. She then received a call from petitioner, who told her that he had placed a call to Klingforth as he had promised. Later that night, she called her therapist and left a message saying that petitioner had used a gun and had forced her to have oral sex. The following day, the victim told her employer about the incident, and he convinced her to call the police. Later, petitioner came to the victim's workplace, and her employer asked him to leave.

2. *Testimony Corroborating the Victim*

The victim's therapist testified that the victim had left a message on her office answering machine on the evening of September 12. She testified that the victim had been "obviously very upset." The therapist had erased the message, but her notes read that "Boyfriend [petitioner] forced oral sex and threatened to kill her. [Victim] very shaken, not certain what to do."[6]

Klingforth's testimony corroborated the victim's story about the times of the telephone calls. He described her demeanor in the first telephone call as "terribly shaken up * * * on the verge of crying." In the second and third calls, she had been "a little more relaxed" but still shaky and upset. Klingforth did not testify to the specifics of the conversations with the victim in his direct examination. He did, however, say that the conversation concerned the victim's meeting with petitioner and that he had asked the victim whether petitioner had raped her. Klingforth also described petitioner's telephone call to him, and his story mirrored the victim's account. On cross-examination, trial counsel asked Klingforth whether the victim had told him that petitioner "had held a gun to her head and forced her to perform oral sex on him." Klingforth said yes.

The victim's employer testified that the victim had been crying at work on the day after the incident. He asked her about it, and, when she told him about the

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[6] Over trial counsel's objection, the trial court admitted the therapist's notes regarding the message under the business records exception to the hearsay rule. (In this and other instances in which we describe the trial court's rulings in petitioner's criminal case, the correctness of the rulings is not at issue, and we express no opinion regarding them.)

crime, he convinced her to call the police. Later, he heard the victim yelling and saw that petitioner had entered the office. He asked petitioner to leave, and petitioner complied. The victim's employer described the victim's reaction as "horrified" and "shaking beyond belief."

3. *Testimony Regarding Petitioner's Confessions*

Two of petitioner's friends, Siemens and Dobbins, testified that petitioner had confessed to forcing the victim to have sex at gunpoint. On direct examination, Siemens testified that, in October or November 1996, while traveling to a mutual friend's barbecue, petitioner had told him that he had held a gun to the victim's head and had had sex with her. On cross-examination, Siemens testified that he and petitioner had been drinking beer during that conversation, but that they had not been drunk because they had just started their first drinks.

Dobbins testified that in the autumn of 1996, while driving to work together, petitioner had told him that he had "held a gun on [a] woman and sodomized her," but that the gun had not been loaded. Dobbins testified that a detective later interviewed him about petitioner, but that he had forgotten to mention petitioner's confession. He called the detective and described the confession in a second interview. On cross-examination, Dobbins said that he had forgotten about the conversation because he had been upset about his recent separation from his wife.

D. *Motion for Acquittal*

After the state rested, trial counsel moved for acquittal on all charges. The trial court reviewed the elements of each charge and granted the motion as to the theft charge

because the state had not presented evidence showing that the victim's letters to petitioner were items of value. The court denied the motion as to the other charges.

E. *Petitioner's Case*

Petitioner sought to prove that the state's case was implausible because the state's witnesses were untrustworthy and because petitioner had not owned a gun matching the victim's description on the day of the incident.

1. *Berardinelli*

Petitioner called Berardinelli, who knew both petitioner and Klingforth. Apparently, trial counsel had intended to cast doubt on Klingforth's credibility by having Berardinelli describe the breakup between petitioner and the victim, and the bad blood it had created between petitioner and Klingforth. However, trial counsel was unable to elicit any substantive testimony from Berardinelli because the trial court ruled that counsel's questions, in the form that counsel put them, would have elicited only irrelevant evidence.[7]

2. *Larson*

Petitioner then called Larson, the client who had come to petitioner's house on the day of the incident. Larson testified that, when she had arrived, the victim had been

[7] Again, we recite the trial court's ruling only as part of our review of the events at petitioner's criminal trial. The correctness of that ruling is not at issue here, and we express no opinion regarding it.

sitting in the victim's car in petitioner's driveway, and petitioner had been talking to her. She said that neither the victim nor petitioner had appeared upset and that the victim had driven away normally. On the state's cross-examination, however, Larson testified that she had not seen the victim's face; she simply recognized the victim's car and saw that someone, whom she assumed to be the victim, was in it.

3. *Taylor*

Petitioner next called Taylor, his private investigator. Trial counsel began questioning Taylor regarding his interview with Dobbins, and the state objected on hearsay grounds. The trial court excused the jury and directed trial counsel to submit an offer of proof. Rather than questioning the witness, trial counsel attempted to describe what Taylor's testimony would be; the trial court admonished him repeatedly that, because the jury had left the courtroom, trial counsel should make his offer of proof by questioning the witness directly.

Trial counsel complied. In response to counsel's questions, Taylor testified that Dobbins, who was then petitioner's roommate, had told him that petitioner kept no guns in the house. Taylor also testified that he had interviewed the victim and that he found her "very cold, very calculating * * * [like] one of those Sharon Stone movies." The trial court excluded the testimony regarding

Dobbins as hearsay and the testimony regarding the victim as overly prejudicial.[8]

4. *Petitioner's Mother*

Petitioner's mother testified that petitioner had owned two guns, both with "blue-black" barrels. She testified that neither gun broke in half for loading.

5. *Petitioner's Testimony*

Finally, petitioner testified that he had owned two guns, neither of which broke in half for loading. He said that he had sold both guns to a friend, Pedersen, in December 1995, but that he had lost the sales receipt. Petitioner testified that Pedersen had moved to Idaho and that neither he nor his investigator had been able to find him.

Petitioner claimed that he had not harmed the victim on the night of the incident, but that he had called her a "whore or prostitute" during their discussion and that she had slapped him. Petitioner testified that, after the victim left, he had called Klingforth to say that he and the victim had "made love" but had "broke[n] off as friends." Petitioner testified that he also had called the victim to apologize for insulting her. After learning of the victim's charges against him, petitioner had visited her workplace and asked her to drop the charges. Petitioner denied telling Siemens or Dobbins that he had assaulted the victim. However, he testified that he and Siemens had been drinking heavily during the time of his alleged confession.

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[8] We note again that the trial court's rulings are not at issue here, and we express no opinion as to whether or not they were correct.

On cross-examination, the prosecutor then confronted petitioner with the evidence that petitioner had told the police that he had sold the guns, not to Pedersen, but to "an unknown person." The prosecutor also suggested that petitioner may have destroyed the receipt identifying the date and the buyer of the gun.

After the defense rested, the state brought one rebuttal witness, a police officer who testified that petitioner had told him that he had sold the two guns to "an unknown person."

F. *Closing Statements and Verdict*

The state's closing argument emphasized the victim's credibility as demonstrated by the corroborating testimony of her therapist, her employer, and Klingforth. The state noted that Siemens' and Dobbins' testimony that petitioner had confessed provided further corroboration. The state characterized petitioner's testimony as untrustworthy, because he had given two different stories about the identity of the gun buyer.

Trial counsel emphasized the victim's motive to punish petitioner for his infidelity, the prior sale of the guns allegedly used in the crime, and the untrustworthiness of Siemens and Dobbins. He noted that Siemens had been drinking during petitioner's alleged confession.

The jury convicted petitioner on all seven counts. A jury poll revealed that its verdict was eleven to one on all counts except for attempted rape, on which its verdict was ten to two. Each count required the vote of ten jurors for a conviction. Juror Ten was in the majority on each count.

Petitioner did not appeal, but later chose to seek post-conviction relief.

II. POST-CONVICTION PROCEEDINGS

In his post-conviction petition, petitioner claimed that trial counsel's representation of him violated Article I, section 11, of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. He alleged that trial counsel had committed numerous errors, including the failure to challenge Juror Ten. Among other evidence, petitioner submitted an affidavit from the trial judge stating that "trial counsel did the poorest job of any trial lawyer [that he had] observed" in his entire career. The trial judge testified that trial counsel's performance had been prejudicial to petitioner's case. Petitioner claimed that, although there was sufficient evidence to show that trial counsel's inadequacy had prejudiced him, the post-conviction court need not find prejudice because trial counsel's performance had "constructively denied [him the] right to counsel" under both constitutions.

The post-conviction court rejected petitioner's arguments and dismissed the petition. Petitioner sought reconsideration, but the court adhered to its initial decision. In both its initial opinion and its denial of reconsideration, the court made various findings of fact. The court found that trial counsel was inexperienced and "did a very poor job" of representing petitioner. The court also found that the trial judge, despite his testimony that trial counsel had performed poorly, had done nothing to stop the trial or to advise petitioner that trial counsel was violating his right to representation. In fact, the judge had

commented several times towards the end of the trial that he did not want to make any mistakes that might cause a reversal "after all this work." Finally, the court noted that the state's case had been very strong, in part because the victim had been a credible witness and because two of the state's witnesses were petitioner's friends. The court concluded that the result would have been the same, even if trial counsel had made no mistakes.

Based on those findings, the post-conviction court concluded that, although trial counsel's performance was "far below the acceptable standard of reasonable skill and judgment required of all attorneys," petitioner had failed to establish by a preponderance of the evidence that trial counsel's performance had caused him actual prejudice. On reconsideration, the post-conviction court further held that the "'sum' of trial counsel's errors do not constitute 'structural error' as that term is defined by federal case law." As noted, the Court of Appeals affirmed the post-conviction court's judgment without opinion, and we allowed review.

III. OREGON CONSTITUTIONAL CLAIMS

On review, petitioner argues that this court should set aside his conviction and grant a new trial because trial counsel made errors that prejudiced his case. He further argues that trial counsel's errors, taken together, were so egregious that he should be granted a new trial without showing actual prejudice, because the entire underlying trial was infected with "structural error." We first address petitioner's theories under the Oregon Constitution and then review his theories under the federal constitution.

See Sterling v. Cupp, 290 Or 611, 614, 625 P2d 123 (1981) (explaining order of consideration).

A. *Inadequate Assistance of Counsel*

Article I, section 11, of the Oregon Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel." To prevail on his post-conviction claim of inadequate assistance of counsel under Oregon law, petitioner must demonstrate, by a preponderance of the evidence, the two elements of that claim: that trial counsel "failed to exercise reasonable professional skill and judgment, and that petitioner suffered prejudice as a result." *Lichau v. Baldwin,* 333 Or 350, 359, 39 P3d 851 (2002).

A showing that the lawyer's acts or omissions prejudiced a petitioner's case is an essential element of establishing a claim of inadequate assistance of counsel. *Stevens v. State,* 322 Or 101, 110, 902 P2d 1137 (1995) ("[O]nly those acts or omissions by counsel which have a *tendency to affect the result* of the prosecution can be regarded as of constitutional magnitude." (quoting *Trujillo v. Maass,* 312 Or 431, 435, 822 P2d 703 (1991); emphasis in *Stevens*)); *Trujillo,* 312 Or at 437 ("[P]etitioner [must] establish * * * facts demonstrating that he was prejudiced as a result of counsel's acts or omissions."); *Krummacher v. Gierloff,* 290 Or 867, 875, 627 P2d 458 (1981) ("Adequacy of assistance of counsel allows for errors which are inconsequential in the context of the entire trial or proceeding.").

Petitioner claims that trial counsel's decision not to challenge Juror Ten was a lapse of "reasonable professional skill and judgment" that prejudiced him. As described above, Juror Ten asserted during *voir dire* that

"I've had several friends that told me they have been raped and I believe them." Petitioner contends that that statement proves that Juror Ten was biased against him because she was predisposed to believe accusations of rape. The court should exclude a prospective juror for "actual bias" if the "prospective juror's ideas or opinions would impair substantially his or her performance of the duties of a juror to decide the case fairly and impartially on the evidence presented in court." *State v. Barone,* 328 Or 68, 74, 969 P2d 1013 (1998). Petitioner claims that trial counsel should have challenged Juror Ten and that his failure to do so was prejudicial because Juror Ten could have been the deciding vote on the charge of attempted rape.

We disagree. For petitioner to prevail, he must be able to demonstrate either (1) that Juror Ten actually was biased and therefore that trial counsel erred by failing to challenge her for cause or (2) that trial counsel failed to exercise reasonable skill and diligence when he concluded that Juror Ten would be able to evaluate the evidence impartially and, for that reason, failed to use one of his peremptory challenges to remove her from the jury. As we describe below, petitioner did not make either showing here.

As trial counsel's colloquy with the other jurors reveals, at least one other juror noted the difference between believing a friend's accusation of rape and evaluating evidence as a juror in a criminal trial.

> "[Trial Counsel:] * * * I'd like to know if you would want more than just somebody's accusation of rape or sodomy. What other kinds of things would you be looking for?

> "[Juror:] You mean if it weren't a friend?
>
> "[Trial Counsel:] Yes.
>
> "[Juror:] Yes. Well, if it weren't a friend, I'd be – if I – the weapon wasn't there, I'd need other evidence. I'd need a – a witness or something. I mean just the word wouldn't be enough for me."

It was not unreasonable for trial counsel to believe that Juror Ten had recognized the same distinction. Moreover, trial counsel did not simply ignore Juror Ten's statement. Rather, he spent time during *voir dire* discussing the dangers of "find[ing] somebody guilty of a crime based solely on an accusation." That discussion allowed trial counsel an opportunity to observe Juror Ten and further evaluate her fitness for the jury.

Trial counsel's affidavit indicates that his observation of Juror Ten led him to believe that she could evaluate the case impartially. We cannot say on this record that that was not a reasonable conclusion for him to reach. Moreover, petitioner presented no evidence beyond the voir dire transcript to substantiate his claim that Juror Ten was actually biased. Petitioner did not prove either that Juror Ten was actually biased or that trial counsel failed to exercise reasonable professional skill and judgment when he allowed Juror Ten to remain on the jury.

In addition to his argument regarding Juror Ten, petitioner claims that trial counsel committed other errors that prejudiced him. As we shall explain, we reject those claims for several reasons.

Many of the acts or omissions by trial counsel that petitioner asserts to be mistakes either did not occur as petitioner describes them or, in context, do not constitute

lapses of professional skill and judgment. For example, petitioner alleges that trial counsel should not have allowed the state to present the motion *in limine*. However, the state's "presentation" of that motion largely consisted of a statement of the state's concessions in response to the motion, each of which benefitted petitioner. Petitioner also claims that trial counsel should not have reserved his arguments on Measure 11 and Measure 40. However, trial counsel's reservation was at the behest of the trial judge, the state conceded petitioner's argument that Measure 40 did not apply to the case, and the trial court ruled that it would follow the decisions of the motions panel regarding Measure 11. In addition, petitioner claims that trial counsel negligently failed to pursue a "no contest" plea agreement and that petitioner would have accepted such an agreement. Trial counsel, however, stated that petitioner refused to allow him to negotiate a plea agreement, adamantly insisting on his innocence. Petitioner's bare assertion that he would have accepted a favorable plea agreement is insufficient to carry his burden of proving that trial counsel failed to provide adequate representation.

Other actions of trial counsel that petitioner cites as error constituted reasonable tactical choices and, therefore, do not demonstrate a lack of professional skill or judgment. For example, as previously noted, trial counsel (with petitioner's agreement) alluded to petitioner's incarceration in the hope of eliciting the jury's sympathy. That tactic, although perhaps misguided, is not necessarily error. *See Estelle v. Williams*, 425 US 501, 508, 96 S Ct 1691, 48 L Ed 2d 126 (1976) (holding that defendant who appeared before jury in prison uniform had received fair trial because he was not compelled to appear in that

manner and noting that "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury"). Similarly, trial counsel's approach to closing argument – including, for example, his decision not to make distinct arguments regarding the separate charges – and his choice to use the defense that petitioner sold his guns to Pedersen were reasonable tactical choices, even if, as petitioner asserts, they backfired.

We agree with petitioner that trial counsel failed to exercise reasonable professional skill and judgment in several respects. The record reveals that trial counsel appeared to be unaware of the disposition of pretrial motions filed by petitioner's previous counsel. His inexperience and unfamiliarity with the rules of evidence caused the trial court to exclude some proffered testimony that might have been helpful to petitioner and that might have been admitted if he had phrased his questions differently. Trial counsel moved for judgment notwithstanding the verdict, a motion that is unavailable in criminal cases. *State ex rel Haas v. Schwabe,* 276 Or 853, 857, 556 P2d 1366 (1976) ("[N]either under our statutes nor under common law is there any basis for the entry of a judgment n.o.v., or its equivalent, in a criminal case."). He made an oral motion for a new trial, a motion that must be presented in writing. ORS 136.535, ORCP 64 D. However, the post-conviction court determined that none of those lapses prejudiced petitioner, and we conclude that evidence in the record supports that determination.

In summary, we conclude that trial counsel's failure to challenge Juror Ten did not demonstrate that trial counsel failed to exercise reasonable professional skill and judgment in his representation of petitioner. We also conclude

that, although trial counsel's conduct of some aspects of the trial fell below the required standard of skill, petitioner has not proved that any of those mistakes had a tendency to affect the result of the prosecution.

B. *Structural Error*

Notwithstanding his inability to prove that any particular error by trial counsel tended to affect the result of the case against him, petitioner nevertheless contends that trial counsel's performance in this case as a whole was so inadequate that it undermined the required "adversarial nature" of the trial. *See United States v. Cronic,* 466 US 648, 656-57, 104 S Ct 2039, 80 L Ed 2d 657 (1984) (Sixth Amendment rights violated when criminal trial loses its adversarial character). Therefore, petitioner urges this court to apply the doctrine of "structural error" and order a new trial, without requiring him to show actual prejudice.

We first note, however, that structural error is a doctrine that originated in federal criminal cases and, contrary to petitioner's assertions, has not been adopted by this court as an aspect of Oregon law, although this court has discussed structural error on several occasions. *See, e.g., State v. Barone,* 329 Or 210, 226, 986 P2d 5 (1999) (holding that this court "has not adopted the doctrine of 'structural' or 'systemic' error in analyzing questions of Oregon law"); *State v. Wilson,* 323 Or 498, 505 n 5, 507, 918 P2d 826 (1996) (declining to address defendant's structural error claims); *State v. Cole,* 323 Or 30, 37 n 5, 912 P2d 907 (1996) (declining to consider doctrine of structural error because actual prejudice existed).

Petitioner alternatively urges us now to adopt the structural error doctrine as part of Oregon criminal law. However, as we discuss below in our analysis of petitioner's federal claims, petitioner's trial did maintain its adversarial nature and involved no arguable structural error even under the theory of structural error that petitioner puts forward.

We pause at this point, however, to comment briefly on petitioner's request that this court adopt some form of the structural error doctrine that federal decisions have recognized. As discussed above, petitioner advances his structural error argument as a basis for this court to grant post-conviction relief even if he cannot demonstrate that his trial counsel's lack of professional skill and judgment caused him prejudice. In other words, petitioner offers "structural error" as an alternative to our usual inquiry into whether his trial counsel's acts and omissions at trial were "prejudicial" or, instead, constituted "harmless error." Although petitioner's argument arises in the context of a post-conviction proceeding, the same inquiry is required in direct criminal appeals when we consider whether errors at trial require reversal. *See State v. Davis,* 336 Or 19, 27-35, 77 P3d 1111 (2003) (discussing "harmless error" analysis). Despite petitioner's carefully reasoned argument in favor of the structural error doctrine, we do not find the concept helpful in determining whether, in an Oregon criminal trial, legal error should result in reversal or whether, in a post-conviction proceeding, trial counsel's mistakes should lead to a new trial.

The term "structural error," of course, appears in no statute or constitutional provision, and the substantive content of the term, as developed in the federal cases, is elusive. Indeed, the term appears to state a conclusion

more than to provide an analytical framework for deciding cases. More significantly, the addition of the abstract adjective "structural" to the commonly used legal term "error" diverts attention from the critical task of determining the existence and nature of any legal errors at trial. In our view, the latter inquiry provides the more appropriate focus and allows a reviewing court sufficient scope to determine whether legal errors at trial were prejudicial or harmless. In *Davis,* for example, this court considered whether the trial court's exclusion of certain evidence was prejudicial by closely examining the "nature of the error" and its context, including its relationship to defendant's factual theory of the case. 336 Or at 32-34. Similarly, in *Cole,* the defendant, without making a valid waiver of his right to counsel, represented himself at a suppression hearing. In rejecting the state's argument that the lack of counsel was harmless, this court reviewed the context in which the right to counsel was denied, the elements of the charges against defendant, and the evidence at trial. *Cole,* 323 Or at 36-37.

Finally, we note that the structural error doctrine, at least as articulated by the federal courts, is not consistent with Article VII (Amended), section 3, of the Oregon Constitution. That section provides, in part:

> "If the supreme court shall be of opinion, after consideration of all the matters submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial * * * ."

This court consistently has held that, under that provision, we "must affirm a judgment, despite any error committed at trial, if, after considering all the matters

submitted, the court is of the opinion that the judgment 'was such as should have been rendered in the case.'" *Davis,* 336 Or at 28. Under Article VII (Amended), section 3, the test for affirmance despite error consists of a single inquiry: "Is there little likelihood that the particular error affected the verdict?" *Id.* at 32.

Obviously, the nature of an error will dictate how much or how little it will take to satisfy us that the error affected the verdict. *See, e.g., Cole* (prejudicial error when defendant denied counsel at suppression hearing); *State v. Cavan,* 337 Or 433, 98 P3d 381 (2004) (prejudicial error when defendant's jury trial for attack on prison guard held in prison where attack occurred). In our view, however, the foregoing discussion demonstrates that the structural error doctrine would not provide a useful analytical tool for Oregon courts to use in determining whether legal error in a trial proceeding should result in reversal. This court's cases discussing prejudicial and harmless error appropriately apply the controlling constitutional requirements and provide sufficient guidance to lower courts and counsel.

IV. FEDERAL CONSTITUTIONAL CLAIMS

A. *Structural Error*

Petitioner asserts that the mistakes made by his trial counsel demonstrate that his trial was tainted by structural error and that that doctrine obviates the need for a showing of prejudice.[9] In *Chapman v. California,* 386 US

[9] The federal precedents do not always distinguish between "structural error" and "presumed prejudice." As we discuss below, the earlier cases speak in terms of presumed prejudice or prejudice *per se,*

(Continued on following page)

18, 87 S Ct 824, 17 L Ed 2d 705 (1967), the Court held that constitutional errors, like other errors, could be subject to harmless error analysis. *Id.* at 22. However, it noted that some constitutional errors, such as deprivation of the right to counsel, could never be considered harmless. *Id.* at 24 n 8. Twenty years later, the Court reiterated its view that most constitutional errors could be reviewed for harmless error, but excluded denial of the right to counsel from that list. *Rose v. Clark,* 478 US 570, 579, 106 S Ct 3101, 92 L Ed 2d 460 (1986).

Decisions after *Chapman* and *Rose* sharply distinguish between trials in which the defendant was denied the right to counsel, either actually or constructively, and cases in which the defendant received the assistance of counsel, but that counsel was ineffective. The Court in *Strickland v. Washington,* 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984), painted a stark distinction between the two, noting that "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice," *Strickland,* 466 US at 692, but that "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice," *id.* at 693.

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while more recent decisions use the phrase "structural error." As we noted at the outset, however, for the purposes of this case those doctrines can be treated as identical. We therefore discuss the relevant federal cases together to present a clear picture of the precedents regarding ineffective assistance of counsel.

The Court highlighted that same distinction in *Cronic,* decided the same day as *Strickland.* There, it stated:

> "When a true adversarial criminal trial has been conducted – *even if defense counsel may have made demonstrable errors* – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."

Cronic, 466 US at 656-57 (emphasis added). The Court noted three circumstances in which prejudice is presumed: the complete denial of counsel, a representation that "entirely fails to subject the prosecution's case to meaningful adversarial testing," and cases in which outside circumstances make effective assistance impossible. *Id.* at 659-60.

The Court first used the term "structural error" in *Arizona v. Fulminante,* 499 US 279, 111 S Ct 1246, 113 L Ed 2d 302 (1991), when it considered whether a defendant needed to prove that the introduction of a coerced confession had prejudiced him. The Court stated that a defendant could prevail without showing prejudice only if he complained of a "structural error," which it defined as an error that "def[ied] analysis by 'harmless-error' standards" and skewed the trial's ability to determine guilt or innocence reliably. *Id.* at 309-10. The Court cited five examples of structural error, including the "*total deprivation* of the right to counsel at trial."[10] *Id.* at 309 (emphasis added).

[10] The Court's other examples included the presence of a biased judge, the exclusion of jurors of the defendant's race, the denial of the defendant's right to self-representation, and the right to a public trial. *Id.* at 310.

The Court concluded that the admission of a coerced confession did not constitute a structural error.

The Court revisited the application of the structural error doctrine to a claim of ineffective assistance of counsel in *Bell v. Cone,* 535 US 685, 122 S Ct 1843, 152 L Ed 2d 914 (2002). The Court reaffirmed its holding in *Cronic,* rejecting a *habeas corpus* petitioner's argument that the court should *presume* prejudice in his ineffective assistance claim: "When we spoke in *Cronic* of the possibility of presuming prejudice * * * , we indicated that the attorney's failure must be *complete.*" *Bell,* 535 US at 696-97 (emphasis added).

The Court's precedents are clear. A defendant who chooses to assert a Sixth Amendment ineffective assistance of counsel claim without proving prejudice must demonstrate that trial counsel's errors were so egregious as to amount to a constructive denial of counsel.

Petitioner's claim does not meet that standard. Although, as we described in detail above, trial counsel made certain mistakes, in fact, his performance served petitioner's interests in many ways. His motion *in limine* forced the state to address and agree to omit potentially damaging evidence, such as petitioner's convictions for DUII and solicitation. He successfully moved to dismiss the theft charge. He cast doubt on Siemens' testimony about petitioner's confession by presenting testimony that Siemens had been drinking heavily during their conversation. He emphasized the suspicious fact that Dobbins had "forgotten" to tell the investigating officer about petitioner's surprising confession during the first interview. He presented testimony that petitioner's guns did not match the victim's description. He argued that it would

have been illogical for petitioner to harm the victim when he risked discovery by the client who was soon to arrive.

We agree with the post-conviction court that the errors petitioner enumerates did not affect the adversarial nature of the trial. Therefore, we hold that his petition fails to demonstrate structural error as that concept has been articulated by the United States Supreme Court.

B. *Ineffective Assistance of Counsel*

As we already have noted, petitioner claims that his trial counsel was ineffective because, *inter alia,* he failed to challenge Juror Ten. The federal constitutional standard for ineffective assistance of counsel is set out in *Strickland,* 466 US at 687, and it requires a convicted defendant to show that "counsel's performance was deficient" and that that deficient performance "prejudiced the defense." Although the Article I, section 11, standard and the federal standard are not identical, the reasons stated above for denying petitioner's state claim are sufficient to deny his federal claim as well. Petitioner has not shown that trial counsel's performance was "deficient" in failing to exclude Juror Ten or that the mistakes trial counsel did make prejudiced him. Petitioner's federal claims fail.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF MARION

DANNY THOMAS RYAN, Petitioner, v. JOAN PALMATEER, Superintendent, Oregon State Penitentiary, Defendant.	Case No. 99C-18624 Honorable Joseph C. Guimond FINDINGS OF FACT, CONCLUSIONS OF LAW

This matter came before the Court and the Honorable Joseph C. Guimond on September 21, 2001 for trial on petitioner's Petition for Post-Conviction Relief. Petitioner appeared in person and by his attorney, Stephen Houze, and defendant appeared by and through her attorney, Ward Douglas Marshall, Assistant Attorney General. This matter came before the Court a second time, on December 6, 2001, on petitioner's Motion for Reconsideration. Petitioner again appeared in person and by his attorney, Stephen Houze, and defendant again appeared by and through her attorney, Ward Douglas Marshall, Assistant Attorney General.

In this proceeding, petitioner contends that his conviction in Multnomah County Case No. 9701-30094 is void and the subsequent sentence invalid in that the conviction was obtained in violation of his constitutional rights, as follows:

> Petitioner claims that post-conviction relief should be granted on the ground that he was constructively denied his right to counsel, and that he

was also denied the effective assistance of counsel in violation of Article I, Section 11, of the Oregon Constitution, Amendments VI and XIV. More specifically:

a. Counsel's pretrial investigation was inadequate in the following respects

1. Counsel did not communicate directly with his investigator.

2. Counsel failed to pursue investigative leads recommended by the investigator.

b. Plea negotiations in this case were inadequate in the following respects:

1. Counsel did not fully and accurately apprise petitioner of the strengths and weaknesses of his case in connection with evaluating the State's plea offer.

2. Counsel did not make a counter-offer to the State's original plea offer in the hope of obtaining more favorable terms.

c. Trial counsel failed to do adequate trial preparation for the examination of witnesses, both with regard to substance of anticipated testimony, and with regard to legal issues that could have been anticipated.

d. Counsel's pretrial motion practice was inadequate in the following respects:

1. Counsel failed to oppose the consolidation of the substantive charges and the witness tampering charges.

2. Counsel failed to cite controlling, recent authority in his motion in limine relating to inadmissible hearsay.

3. Counsel appeared on the morning of trial without having ascertained the status of two major pretrial motions filed by former counsel, one relating to Measure 11 and the other to Measure 40.

4. When counsel was made aware that the Measure 40 motion had not been heard, he indicated that he would like to reserve argument on the motion until the time of sentencing.

e. Counsel's conduct of voir dire was inadequate in the following respects:

1. Counsel failed to ask questions that effectively elicited necessary information concerning the prospective juror's capacity to give petitioner a fair hearing.

2. The nature of the questions asked, and the manner in which they were asked, alienated some of the jurors.

3. Counsel failed to challenge for cause a prospective juror who indicated that she would "automatically believe" any allegation of rape.

4. Counsel also failed to exercise a peremptory challenge on this juror, although he had three such challenges remaining at the conclusion of voir dire.

f. Counsel's performance with regard to opening statement was deficient in the following respects:

1. Counsel failed to articulate clearly the salient facts and the defense theory of the case.

2. Counsel alluded to the fact that petitioner was being held in custody pending trial.

g. Counsel's performance with respect to the State's case-in-chief was deficient in the following respects:

1. Counsel failed to object to leading questions put by the prosecutor.

2. Counsel failed to object to damaging, inadmissible hearsay.

3. On cross-examination of the State's witnesses, counsel elicited testimony that was damaging to the defense.

h. Trial counsel's presentation of the defense case was deficient in the following respects:

1. Counsel was unable to elicit any helpful testimony from the first two defense witnesses, due to a lack of legal and factual preparation, and because he did not know how to make an offer of proof.

2. Counsel was able to elicit a small amount of helpful testimony from the third and fourth defense witnesses. Although the helpfulness of that testimony was substantially negated by aggressive cross-examination, counsel failed to engage in any re-direct examination to rehabilitate his witness.

3. Counsel was wholly ineffective in eliciting testimony from petitioner. More specifically:

a. Trial counsel elicited very substantial testimony from petitioner concerning the sale of alleged gun that was used in the incident. The testimony was completely uncorroborated, and was contradicted by the prosecution. The net effect was to severely damage petitioner's credibility.

b. Counsel failed to elicit a clear, succinct statement from petitioner concerning the facts of the case.

i. Counsel was ineffective in closing argument in the following respects:

1. He failed to articulate clearly the defense theory of the case.

2. He failed to emphasize the burden of proof with respect to the charges.

3. He failed to make distinct arguments with respect to the distinct charges.

4. He failed to advocate clearly that his client was innocent.

j. Counsel was ineffective in connection with the post-verdict proceedings in the following respects:

1. He attempted to orally move for a new trial, and for a judgment notwithstanding the verdict.

2. He incorrectly asserted that petitioner had a right to be sentenced within 48 hours.

3. He represented to the Court that a presentence investigation had already been done, when in fact what had been conducted was a pretrial release investigation report.

4. He failed to advocate for petitioner in any way at the point in the proceedings when the Court was considering a contempt order, based on petitioner's asserted improper conduct.

k. Counsel was ineffective in his post-trial performance in that he failed to adequately apprise

petitioner of possible grounds of appeal and/or motion for a new trial or post-conviction relief.

Petitioner has personal knowledge of the following facts:

a. Petitioner informed counsel of a witness who could corroborate his claim concerning the gun used in the alleged incident. Counsel's attempts to locate that witness were unsuccessful. Nevertheless, counsel elicited substantial testimony from petitioner concerning the witness, thus undermining petitioner's credibility. (See 3.h) (3)(a) *supra*).

b. Petitioner informed counsel of severe physical and mental difficulties he experienced as a result of an auto accident some years prior to the instant proceeding. Counsel took no steps to ascertain whether these difficulties might have a bearing on a possible defense.

c. Counsel never conducted a thorough, personal interview of petitioner concerning the facts and circumstances surrounding this case.

d. Counsel failed to keep petitioner apprised of the status of his case, and failed to involve petitioner in any aspect of trial preparation.

e. Although petitioner was offered the opportunity to plead guilty to a non-Measure 11 offense, counsel did not engage in a thorough and meticulous discussion with petitioner regarding the advisability of accepting the plea. In addition, counsel did not explain that it might have been possible to plead no contest, thus getting the benefit of an assured outcome, without petitioner being compelled to admit his guilt for actions he denies committing.

f. Counsel failed to advise petitioner that it would be highly prejudicial for the jury to learn of his custody status pending trial.

g. Counsel allotted an inadequate amount of time to prepare petitioner for his trial testimony. The effect of this error in preparation was exacerbated by Petitioner's speech defect. As a result, petitioner's testimony was halting in character and marred by stuttering.

h. Counsel failed to consult with petitioner during the course of the trial.

The Court having considered the evidence and counsel's arguments, now makes the following:

FINDINGS OF FACT

1. There is no doubt but that the petitioner's trial counsel did a very poor job of representing petitioner during the course of this trial on very serious charges. The inexperience of petitioner's trial counsel, Daniel Russell, was evident in Mr. Russell's voir dire, his witness preparation, his questioning of witnesses (both state and defense), his questioning of petitioner, his closing argument, and his post-trial motions, which included a motion not available in criminal cases.

2. Mr. Russell's affidavit states that he disclosed his inexperience to petitioner before being retained.

3. Mr. Tom Bostwick, an attorney with many years of experience as both a prosecutor and defense counsel, testified for the defendant as an expert. Mr. Bostwick was a credible witness. He testified that, in his opinion, Mr. Russell had "botched" certain areas of the trial and was

not effective in others. Mr. Bostwick pointed out, however, that different attorneys do things in very different ways and, while Mr. Russell's overall performance was not a model of trial practice, it was not so deficient as to deprive petitioner of a fair trial. Therefore, it was Mr. Bostwick's opinion that Mr. Russell's errors did not have a tendency to affect the outcome of the trial.

4. Mr. Bostwick testified that, in his opinion, the State had a very strong case against the petitioner, including a very credible victim. The State also had two witnesses who were friends of petitioner and to whom petitioner admitted that he committed the crimes.

5. Although Judge Aaron Brown admonished trial counsel many times during the trial, he did nothing to stop the trial, to advise petitioner on the record that he believed petitioner was not receiving adequate representation, or to declare a mistrial based on trial counsel's ineffective performance.

6. Judge Brown testified that, in his opinion, the performance of trial counsel was the worst he had witnessed in his entire career as a trial court judge. It was also his opinion, at the time of deposition, that trial counsel's performance was prejudicial, *i.e.*, that it had a tendency to affect the outcome of the case. However, in light of the factors mentioned in paragraphs 5 and 7 of these Findings of Fact, I conclude that at the time of trial, Judge Brown did not believe that trial counsel's ineptitude was having a tendency to affect the outcome of the case. Therefore, while I respect and admire Judge Brown's candid observations and opinions about trial counsel, I do not find his opinion on the issue of prejudice to be credible.

7. Notably, the trial record is completely devoid of any suggestion by Judge Aaron Brown that Mr. Russell's performance was "so bad" that it would require a retrial of petitioner. To the contrary, on several occasions as the trial was winding down, Judge Brown made comments on the record to the effect that he did not want any "last minute" mistakes that might cause a reversal of any jury verdict "after all this work."

8. The Court relies upon attorney Bostwick's opinion that, given the strength of the state's case, tha[t], in all likelihood, the result would have been the same, even if trial counsel had done his job in a totally effective manner.

CONCLUSIONS OF LAW

1. Mr. Russell's "performance" was far below the acceptable standard of reasonable skill and judgment required of all attorneys.

2. Petitioner failed to prove that he suffered some actual prejudice from the acts or omissions of his trial counsel, *i.e.*, petitioner failed to establish by a preponderance of the evidence that trial counsel's errors had a tendency to affect the outcome of the trial.

3. Petitioner failed to prove that trial counsel's performance was so inept and incompetent as to render the trial fundamentally unfair to petitioner. Indeed, if I found that trial counsel's admittedly "poor" performance rose to this level, I believe I would have been compelled to find that petitioner had suffered some actual prejudice from the actions of his trial counsel and I have already determined that he did not. Therefore, the "sum" of trial

counsel's errors do not constitute "structural error" as that term is defined by federal case law.

4. Based on the findings of fact set forth above, in the underlying criminal proceedings resulting in petitioner's conviction, petitioner was not denied the right to assistance of counsel, as guaranteed by either the United States Constitution and as articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), or the Constitution of the State of Oregon.

5. Petitioner did not prove any of his claims for relief by a preponderance of the evidence.

DATED this 23 day of May, 2002.

/s/ Joseph C. Guimond
HONORABLE JOSEPH C. GUIMOND
CIRCUIT COURT JUDGE

Submitted by: W. Douglas Marshall
Assistant Attorney General

IN THE CIRCUIT COURT OF THE
STATE OF OREGON

FOR THE COUNTY OF MARION

DANNY THOMAS RYAN, Petitioner, v. JOAN PALMATEER, Superintendent, Oregon State Penitentiary, Defendant.	Case No. 99C-18624 Honorable Joseph C. Guimond JUDGMENT

The above case came on for trial on September 21, 2001 before the Honorable Joseph C. Guimond. Petitioner appeared in person and by his attorney, Stephen Houze, and defendant appeared by and through her attorney, Ward Douglas Marshall, Assistant Attorney General. Argument in this case was also heard on December 6, 2001, on petitioner's motion for reconsideration.

The Court having considered all evidence before it and, based on the Findings of Fact and Conclusions of Law separately entered,

NOW, THEREFORE, IT IS HEREBY ADJUDGED that petitioner's Petition for Post-Conviction Relief is denied, and this action is dismissed with petitioner taking no relief.

DATED this 23 day of May, 2002.

/s/ Joseph C. Guimond
HONORABLE JOSEPH C. GUIMOND
CIRCUIT COURT JUDGE

Submitted by: W. Douglas Marshall
Assistant Attorney General

Court Reporter:

FILED: November 5, 2003

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

DANNY THOMAS RYAN, Appellant, v. JOAN PALMATEER, Superintendent, Oregon State Penitentiary, Respondent.	) Marion County Circuit) Court No. 99C-18624)) A118415))))))

Joseph C. Guimond, Judge

Argued or submitted on briefs: October 16, 2003

Before Haselton, Presiding Judge, and Linder, Judge, and Leeson, Judge pro tempore

Attorney for Appellant: Stephen A. Houze

Attorney for Respondent: Kathleen Cegla

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent
[ ] No costs allowed.
[X] Costs allowed, payable by: Appellant

FILED: March 10, 2005

IN THE SUPREME COURT OF THE
STATE OF OREGON

DANNY THOMAS RYAN,

Petitioner on Review,

v.

JOAN PALMATEER, Superintendent, Oregon State Penitentiary,

Respondent on Review.

(No. 99C-18624; CA A118415; SC S51169)

En Banc

On review from the Court of Appeals.*

Argued and submitted November 8, 2004.

Stephen A. Houze, Portland, attorney for petitioner on review.

Kathleen Cegla, Assistant Attorney General, Salem, attorney for respondent on review.

BALMER, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

*Appeal from Marion County Circuit Court, Joseph C. Guimond, Judge. 190 Or App 398, 79 P3d 917 (2003).

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on Review

[X] Costs allowed, payable by: Petitioner on Review

APPELLATE JUDGMENT and SUPPLEMENTAL JUDGMENT

MONEY AWARD

Judgment # 1

Creditor: JOAN PALMATEER,
Superintendent, Oregon State Penitentiary

Creditor's Attorney: Kathleen Cegla
1162 Court St NE #400
Salem OR 97301

Debtor: DANNY THOMAS RYAN

Debtor's attorney: Stephen A. Houze

Costs: $354.28

TOTAL AMOUNT: $354.28

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: April 19, 2005

SUPREME COURT
(Seal)